

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DONALD P. EMERY, et al.,

Plaintiffs,

v.

PIERCE COUNTY, a political  
corporation located in the State of  
Washington, et al.,

Defendants.

CASE NO. C08-5282BHS

ORDER DENYING  
PLAINTIFFS' MOTION FOR  
RECONSIDERATION

This matter comes before the Court on Defendants' motion for reconsideration (Dkt. 85) of the Court's prior summary judgment order in favor of Defendants on all claims made (Dkt. 83). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby denies the motion for reconsideration as discussed herein.

**I. PROCEDURAL HISTORY**

On May 7, 2008, Plaintiffs filed this action for damages in Thurston County Superior Court. Dkt. 1, Ex. A. On the same day, Defendants removed the action to federal court. Dkt. 1. On November 13, 2008, Defendants answered the complaint. Dkt. 18. On October 15, 2009, Plaintiffs requested leave to file an amended complaint. Dkt. 30. On October 26, Defendants responded to Plaintiffs' motion to amend. Dkt. 32. On October

27, 2009, the matter was reassigned with the prior motions referred to the undersigned. Dkt. 36. On October 28, 2009, Plaintiffs replied to Defendants' response to the motion to amend. Dkt. 40. On November 23, 2009, the Court granted the motion to amend. Dkt. 47. On November 30, 2009, Plaintiffs filed their amended complaint. Dkt. 48. On December 22, 2009, Defendants moved the Court for summary judgment, which included a motion to strike certain information relied upon by Plaintiffs. Dkt. 53. On January 12, 2010, Plaintiffs responded to the motion for summary judgment. Dkt. 65. On January 20, 2010, Defendants replied. Dkt. 73. On February 19, 2010, the Court granted Defendants motion for summary judgment. Dkt. 83.

On February 19, 2010, Plaintiffs moved the Court to reconsider its summary judgment order. Dkt. 85. On February 22, 2010, the Court ordered a response to the instant motion. Dkt. 86. On March 5, 2010, Defendants responded. On March 10, 2010, Plaintiffs filed a reply.<sup>1</sup>

## II. FACTUAL BACKGROUND

This matter arises out of Plaintiffs' use and alleged misuse of their property. *See generally* Dkt. 48. Plaintiffs have owned two parcels of property in Pierce County, Washington since 1915. Declaration of John C. Cain (Cain Decl.), Ex. 29 ¶ 7. Over the years, Plaintiffs have utilized these parcels for "timber production and harvesting, farming, and trucking." *Id.*

Pierce County's 1994 comprehensive plan rezoned Plaintiffs' property in 1994. Ord. #94-82s. This zoning became effective January 1, 1995. *Id.* Based on inspections of Plaintiffs' land, which began in 2004, Pierce County Department of Planning and Land Services ("PALS") issued six notices/orders in relation to certain activities Plaintiffs were

---

<sup>1</sup>Generally, responsive pleadings to a motion for reconsideration are not to be filed unless by request of the Court. Local Rule CR 7(h)(3) (court "*may authorize* a reply") (emphasis added). Although the Court requested Defendants' response, it did not request Plaintiffs' reply. However, the Court has reviewed Plaintiffs' reply in an effort to ensure that the Court did not overlook a meritorious argument.

1 engaged in, on their property, which PALS determined to be illegal. Dkt. 48, Exs. 1-2.  
2 Plaintiffs allege that, on more than one occasion, these inspections resulted from  
3 uninvited entry and unwarranted searches upon their land. Dkt. 48 ¶ 3.9.

4 Plaintiffs admit that they informed the county that they would not comply with  
5 these land use cease and desist order(s). Dkt. 54, Declaration of P. Grace Kingman  
6 (Kingman Decl.), Ex. 2 at 1 (Emery Deposition). Plaintiffs allege that these orders issued  
7 without a hearing on the merits and did not inform them that they needed to apply for a  
8 non-conforming use permit. Dkt. 48 ¶ 3.12; Declaration of Donald P. Emery. The orders  
9 did inform Plaintiffs that “[a]ppeals of the Correction Notice/Cease and Desist Order shall  
10 proceed according to PCC 1.22.090” (Pierce County Code). *See, e.g.*, Dkt. 48, Ex. 1 at 4.  
11 Part IV of the order(s) also informed Plaintiffs that they “must submit an application . . .  
12 for an Appeal of an Administrative Official’s Decision . . . within fourteen (14) days of  
13 the date of [the] order.” *Id.* at 7. Plaintiffs did not make such appeal.

14 The order(s) also informed Plaintiffs that “noncompliance [with the order] may  
15 result in . . . criminal charges.” *Id.* at 10. Additionally, the August 25, 2004, Notice and  
16 Order to Correct informed Plaintiffs that one option for resolution was to “contact Terry  
17 Belieu, Associate Planner, . . . to apply for a Conditional Use Permit.” Dkt. 48, Ex. 2 at 1.  
18 Plaintiffs eventually filed for a conditional use permit in June of 2005. Plaintiffs did  
19 receive acknowledgment of non-conforming use rights from the county in February of  
20 2006. Dkt. 66-5 at 14 (the letter). Plaintiffs appealed this letter, and PALS issued an  
21 amended/revised letter of acknowledgment, by letter dated April 3, 2007. Dkt. 67-9 at 12-  
22 15.

23 Plaintiffs also allege that, in addition to these orders, “Defendants knowingly  
24 recommended to the Pierce County Prosecutor that the [Plaintiffs] be criminally charged  
25 with land use violations that were false and not supported in either law [or] fact . . . .”  
26 Dkt. 48 ¶ 3.8. The prosecutor did, in fact, bring criminal charges against Plaintiffs. *Id.*  
27 Plaintiffs allege that, although these charges were eventually dropped, they incurred great  
28

1 expense because of the charges. *Id.* The charges were dropped on April 4, 2007. *See* Dkt.  
2 55, Declaration of Cort O'Connor (O'Connor Decl.) at 2.

3 Based on the foregoing, Plaintiffs alleged nine causes of action against  
4 Defendants: (1) violations under 42. U.S.C. § 1983, et seq.; (2) failure to train, supervise  
5 or instruct; (3) negligence; (4) unreasonable search, violating the Fourth Amendment of  
6 the United States Constitution; (5) inverse condemnation; (6) trespass; (7) interference  
7 with a business expectancy; (8) malicious prosecution; and (9) abuse of process. Dkt. 48  
8 ¶¶ 4.1.1 - 4.9.3.

9 The Court ordered summary judgment in favor of Defendants on each of these  
10 causes of action. Dkt. 83. Plaintiffs now move for reconsideration. Dkt. 85. Plaintiffs  
11 contend that the Court erred in dismissing the claims for malicious prosecution, violation  
12 of 42 U.S.C. § 1983, and negligence. Dkt. 85 at 6. Plaintiffs do not assert error regarding  
13 the remaining claims dismissed on summary judgment. *Id.*

### 14 III. DISCUSSION

#### 15 A. Summary Judgment Standard

16 Summary judgment is proper only if the pleadings, the discovery and disclosure  
17 materials on file, and any affidavits show that there is no genuine issue as to any material  
18 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).  
19 The moving party is entitled to judgment as a matter of law when the nonmoving party  
20 fails to make a sufficient showing on an essential element of a claim in the case on which  
21 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323  
22 (1985). There is no genuine issue of fact for trial where the record, taken as a whole,  
23 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*  
24 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must  
25 present specific, significant probative evidence, not simply "some metaphysical doubt").  
26 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if  
27 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or  
28

jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

## **B. Motion for Reconsideration Standard**

Motions for reconsideration are governed by Local Rule CR 7(h), which provides as follows:

Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.

## **C. Defendants' Motion for Reconsideration**

### **1. Basis of Plaintiffs' Complaint**

Plaintiffs claim the Court erred in concluding that six notices/orders formed the basis of their complaint. Dkt. 85 at 1. Plaintiffs urge, instead, that the basis of their complaint is the criminal prosecution filed against them by Pierce County. *See* Dkt. 85 at 1-2; *see also* Amended Complaint ¶ 3.8 (alleging that PALS recommended criminal charges be filed by the prosecutor). Notably, however, Lori Kennedy, the prosecutor in this matter, filed the criminal action based on the underlying notices/orders of land use

1 violations. *See* Dkt. 67-3, Declaration of Lori Kennedy (Kennedy Decl.) ¶¶ 9, 22  
2 (Kennedy stating under oath that she only files criminal actions based on the information  
3 she receives establishing sufficient evidence that a person is in violation of land use  
4 regulations and subject to criminal action). Thus, the Court concludes that the underlying  
5 notices/orders, having formed the basis of the criminal charge against Plaintiffs, provide  
6 the foundation of Plaintiffs' current action, regardless of their characterization. Put  
7 otherwise, without these notices/orders, Pierce County would have lacked a basis upon  
8 which to have filed the criminal complaint.

9 As discussed in the order on summary judgment, Plaintiffs failed to challenge the  
10 first five of six orders/notices of their land use violations. Dkt. 83 at 6. In doing so,  
11 Plaintiffs failed to exhaust their administrative remedies with respect to these  
12 notices/orders and they became verities. *See* PCC 1.22.090; RCW 36.70C. Further, the  
13 statute of limitations ran on the first five orders. Dkt. 83 at 6.

14 With respect to the notice/order number six, the Court previously concluded that,  
15 while Plaintiffs did challenge the order/notice, they did not appeal the decision; therefore,  
16 it too became a verity. *See* PCC 1.22.090; RCW 36.70C.

17 Because Plaintiffs fail to meet their burden on reconsideration with respect to the  
18 Court's prior conclusions about the orders/notices, the Court declines to reconsider its  
19 prior ruling on these issues.

## 20 **2. Arrest Without Probable Cause**

21 Plaintiffs next contend that "a reasonable juror would have little difficulty  
22 concluding that there was no probable cause for the filing of a criminal charge . . . ." Dkt.  
23 85 at 3. The issue of probable cause to file a criminal action is an element that Plaintiffs  
24 must prove to establish their malicious prosecution claim. Therefore, the Court resolves  
25  
26  
27  
28

1 the issue of probable cause within the section below concerning Plaintiffs' malicious  
2 prosecution claim.<sup>2</sup>

### 3       **3. Malicious Prosecution**

4       Plaintiffs argue that "a reasonable juror . . . could determine that [m]alicious  
5 [p]rosecution had occurred." Dkt. 85 at 6. To prevail on a malicious prosecution claim,  
6 Plaintiffs must show that: (1) the prosecution claimed to have been malicious was  
7 instituted or continued by Defendants; (2) there was *want of probable cause* for the  
8 institution or continuation of the prosecution; (3) proceedings were instituted or continued  
9 through malice; (4) proceedings terminated on the merits in favor of Defendants, or were  
10 abandoned; and (5) Plaintiffs suffered injury or damage as a result of the prosecution.  
11 *Brin v. Stutzman*, 89 Wn. App. 809, 818 (1998).

12       The Court previously concluded that Plaintiffs failed to allege adequate facts to  
13 satisfy each of these elements. Dkt. 83 at 13. Specifically, the Court determined that  
14 Plaintiffs have not established malice or that Defendants lacked probable cause to  
15 continue the prosecution. *Id.* at 13-14. Plaintiffs contend the Court's conclusions were in  
16 error. Dkt. 85 at 6.

17       As Plaintiffs correctly point out, probable cause is defined as "a reasonable ground  
18 of suspicion, supported by circumstances sufficiently strong in themselves to warrant a  
19 cautious man in believing the accused to be guilty." *State v. Scott*, 93 Wn.2d 7, 11 (1980).

20       Plaintiffs contend that evidence must support criminal wrongdoing for a criminal  
21 complaint to be filed. Dkt. 85 at 3. Plaintiffs also assert that "[t]his is not a challenge to an  
22 administrative decision." *Id.*

---

23  
24  
25       <sup>2</sup> To the extent Plaintiffs argue for reconsideration on the basis that Mr. Emery was  
26 "functionally" arrested without probable cause, the claim fails. *See* Dkt. 85 at 9-10. First, this  
27 new argument is not properly before the Court on reconsideration. Second, Plaintiffs offer no  
28 authority for this proposition of "functional arrest" occurring by reason of Mr. Emery having to  
appear in Court.

1           However, the prosecutor in this matter received a packet of information which  
2 included five 5 notices/orders of violations. Those violations became verities when  
3 Plaintiffs did not appeal them, which subjected Plaintiffs to criminal prosecution. The  
4 prosecutor, in her declaration, notes that she filed the criminal action based on the  
5 information received and that it established sufficient information to charge Plaintiffs.  
6 Kennedy Decl. ¶¶ 9, 22. Plaintiffs fail to provide contrary evidence to this fact. *See*  
7 Emery Decl. ¶¶ 2-4. Instead, Plaintiffs only support their claim by speculation and  
8 impermissible inference, which is fatal to their claim. *See Lujan v. Nat'l Wildlife Fed'n*,  
9 497 U.S. 871, 888-89 (1990) (Conclusory, nonspecific statements in affidavits are not  
10 sufficient, and missing facts will not be presumed.).

11           Plaintiffs further contend that their non-conforming use rights should have  
12 prevented any zoning violations in the first place, as well as the subsequent criminal  
13 action. Dkt. 85 at 3. However, the burden to establish such rights rests with the land  
14 owner. The notices/orders, when issued, were made on the County's belief, rightly or  
15 wrongly, that Plaintiffs were not entitled to such rights. Although the County later  
16 acknowledged the non-conforming rights, the burden rested on Plaintiffs to establish such  
17 rights at the time they could have challenged the orders/notices. *See Miller v. City of*  
18 *Bainbridge*, 111 Wn. App. 152, 164-65 (2002). In general, the purpose of such land use  
19 violation orders/notices is to alert a land owner to a perceived violation and provide that  
20 land owner with an opportunity to correct any errors or to correct the violation. Because  
21 Plaintiffs did not challenge the 2004 orders/notices, the County's later acknowledgment  
22 of the nonconforming-use rights does not undermine the propriety of the criminal action's  
23 initiation. Indeed, Plaintiffs admit to failing to challenge the orders/notices issued in  
24 2004. *See* Dkt. 83 at 2.

25           Plaintiffs next contend that the County should not have been permitted to continue  
26 its criminal prosecution because the County acknowledged such rights existed, thereby  
27 obviating the need to prove that such rights existed. Dkt. 85 at 9. However, Plaintiffs  
28

1 appealed the initial letter of acknowledgment, dated February 17, 2006. Dkt. 66-5 at 14  
2 (the letter). The County did not finalize its position on Plaintiffs' nonconforming rights  
3 until issuing its "revised/amended" conformation letter dated April 3, 2007. Dkt. 67-9 at  
4 12-15. On April 4, 2007, the Prosecutor dismissed the criminal action without prejudice.

5 In short, the Court finds Plaintiffs' position illogical. Initially, the prosecutor filed  
6 charges based on the underlying land use decisions, which had been unchallenged and  
7 were, therefore, verities. Put otherwise, the challenge to probable cause is necessarily a  
8 challenge to the underlying administrative decision. Then, the criminal prosecution  
9 persisted only until one day after the County issued its final acknowledgment of  
10 Plaintiffs' nonconforming rights. *See* Dkt. 67-9 at 12-15 (letter revising/amending  
11 confirmation of nonconfirmation use); O'Connor. Decl. at 2 (trial dismissed April 4,  
12 2007). As a result, probable cause to continue the criminal prosecution persisted at least  
13 and until the final acknowledgment issued on April 3, 2007. Plaintiffs provide no  
14 evidence other than their own speculation that probable cause was lacking. Failure to  
15 establish the want of probable cause is fatal to a malicious prosecution claim, as is the  
16 case here. *See Brin*, 89 Wn. App. at 818.

17 Even if the Court concluded the prosecutor lacked probable cause to file or  
18 continue the criminal prosecution, Plaintiffs' malicious prosecution claim fails due to an  
19 inability to plead facts sufficient to establish the element of malice. *See Brin*, 89 Wn.  
20 App. at 818 (requiring malice be shown in an action for malicious prosecution). Indeed,  
21 Plaintiffs present no actual evidence to support a finding of malice other than mere  
22 speculation. Speculation will not do duty for probative facts. *See Lujan v. Nat'l Wildlife*  
23 *Fed'n*, 497 U.S. 871, 888-89 (1990).

24 Therefore, the Court denies Plaintiffs' motion for reconsideration on this issue.

#### 25 **4. § 1983 Claims, Exhaustion of Remedies**

26 Plaintiffs contend that § 1983 claims do not require an exhaustion of  
27 administrative remedies. Dkt. 85 at 9. Plaintiffs' argument is misguided. If Plaintiffs had  
28

1 asserted that the notices/orders themselves were constitutionally infirm, their position  
 2 regarding exhaustion of administrative remedies might be cognizable. However, Plaintiffs  
 3 present no evidence in the record supporting a claim that they were deprived of due  
 4 process or other constitutional rights in connection with the administrative process. In any  
 5 event, the statute of limitations for challenging these orders has already expired.

6 Therefore, the Court declines to reconsider this issue.

## 7 **5. Monell Claims**

8 Plaintiffs argue that the Court improperly concluded that Plaintiffs had to establish  
 9 a *Monell* claim. Dkt. 85 at 1. Plaintiffs begin this argument by claiming that Mr. Emery  
 10 was “functionally” arrested, which gave rise to their § 1983 claim. *Id.* at 10. However,  
 11 Plaintiffs site no authority for this proposition of “functional” arrest.

12 Next, Plaintiffs argue that the “Court’s reliance on *Monell* is misplaced because  
 13 *Monell* and its progeny are dealing with local government employees taking some  
 14 *unauthorized* action that may not be the official position of the government.” Dkt. 85 at  
 15 10. This is incorrect. The Ninth Circuit has made it clear as to what constitutes a *Monell*  
 16 claim:

17 A municipality or other local government entity may be sued for  
 18 constitutional torts committed by its officials according to an official policy,  
 19 practice, or custom. *Monell v. N.Y. City Dep’t of Soc. Servs.*, 436 U.S. 658,  
 20 690-91 (1978). A litigant can establish a *Monell* claim in one of three ways:  
 21 (1) by showing a longstanding practice or custom which constitutes  
 22 the standard procedure of the local governmental entity; (2) by  
 23 showing that the decision-making official was, as a matter of state  
 24 law, a final policy- making authority whose edicts or acts may fairly  
 25 be said to represent official policy in the area of decision; or (3) by  
 26 showing that an official with final policymaking authority either  
 27 delegated that authority to, or ratified the decision of, a subordinate.  
 28 *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005); *see also*  
*Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 (1986).

The Ninth Circuit has also explained that

Generally, a municipality is liable under *Monell* only if a municipal  
 policy or custom was the “moving force” behind the constitutional  
 violation. In other words, there must be “a direct causal link between a  
 municipal policy or custom and the alleged constitutional deprivation.”  
 Furthermore, it is not enough to “merely [to] alleg[e] that the existing . . .  
 program . . . represents a policy for which the city is responsible.”

1 *Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950, 957-58 (2008) (citations omitted).  
2 In short, Plaintiffs' position regarding what a *Monell* claim is, is contrary to the case law  
3 on this issue.

4 Alternatively, Plaintiffs contend that, if such a policy or custom must be shown,  
5 then they have done so by "detailing how the County has filed baseless criminal  
6 complaints against other land owners with nonconforming business operations, then  
7 dismissed the complaints after causing great harm." Dkt. 85 at 11 (relying on Emery Decl.  
8 at page 2, lines 12 -13). However, Mr. Emery's allegations are not evidence. Plaintiffs  
9 have provided no declarations of other land owners so affected. Plaintiffs have provided  
10 no evidence of a policy or custom that was the moving force behind what allegedly  
11 occurred in their case. Again, speculation will not do the duty of probative facts.

12 Because, Plaintiffs have not provided any evidence whatsoever of a municipal  
13 policy or custom, they are unable to establish a claim against Pierce County. *See id.*  
14 Therefore, the Court declines to reconsider its prior ruling with regard to liability sought  
15 to be imposed against Pierce County.

## 16 **6. Negligence**

17 Plaintiffs contend that the Court erred on summary judgment with respect to their  
18 negligence claim because the Court concluded the burden to establish non-conforming  
19 rights rests with the land owner. *See* Dkt. 85 at 11 (discussing Dkt. 83 at 11). Plaintiffs  
20 make the argument that Defendants breached a duty to "act with reasonable diligence in  
21 determining whether a particular operation is entitled to nonconforming use protection."  
22 *Id.* However, Plaintiffs provide no authority for this position. Dkt. 85 at 12 (citing only an  
23 "implicit" inference in the code). The Court is unpersuaded by Plaintiffs' argument.

24 Therefore, the Court declines to reconsider its prior ruling on this issue.  
25  
26  
27  
28

**IV. ORDER**

Therefore, it is hereby

**ORDERED** that Plaintiffs' motion for reconsideration (Dkt. 85) is hereby  
**DENIED** as discussed herein.

DATED this 5<sup>th</sup> day of April, 2010.



BENJAMIN H. SETTLE  
United States District Judge